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In The

Supreme Court of the United States

October Term, 1984

CAPITAL TELEPHONE COMPANY, INC., PETER A. BAKAL, TRI-CITIES TELEPHONE COMPANY, INC., and CAPITAL DISTRICT ANSWERING SERVICE, INC.

Petitioners,

vs.

NEW YORK TELEPHONE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED - A COUNTERSTATEMENT

1. Whether, in view of the regulatory framework enacted by the New York state legislature, coupled with the active implementation thereof in prior rulings of the Public Service Commission of the State of New York ("PSC" or "Commission"), respondent New York Telephone Company's rates and practices relating to the interconnection of local radio carriers are entitled to "state action" immunity under the principles of federalism embodied in the *Parker-Midcal-Southern Motor Carriers* doctrine?

LIST OF AFFILIATED CORPORATIONS

All of the parties to the appeal in the court below are set forth in the caption.

Respondent New York Telephone Company is a wholly-owned subsidiary of NYNEX Corporation, a Delaware Corporation. Empire City Subway Company is a subsidiary of respondent New York Telephone. NYNEX Corporation also owns or has an interest in New England Telephone Company, NYNEX Development Company, NYNEX Business Information Systems Company, NYNEX Mobile Communications Company, NYNEX Information Resources Company, NYNEX Materiel Enterprises Company and NYNEX Service Company. NYNEX Service Company partly owns Bell Communications Research, Inc.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New York Telephone Company ("respondent" or "Telephone Company") opposes, and files this brief in opposition to, the Petition by Capital Telephone Company, Inc. ("Capital" or "Capital Telephone"), Peter A. Bakal ("Bakal"), Tri-Cities Telephone Company, Inc. ("Tri-Cities Telephone") and Capital District Answering Service, Inc. ("Capital District") for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit in Capital

Telephone Company, Inc., et al. v. New York Telephone Company, No. 84-717[illegible], issued on December 18, 1984.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

A. Introduction

This case is governed by this Court's recent decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, ____ U.S. ____, No. 82-1922, issued on March 27, 1985. Through a detailed set of statutes, the State of New York has delegated to the PSC the obligation to consider alternative courses of utility conduct and to choose the appropriate course pursuant to the statutory standards. The conduct complained of by petitioners — involving interconnection rates and practices — is at the heart of this statutory scheme. Not only does the statutory scheme evince a legislative intent that the regulatory body closely orchestrate the activities in question, but the record in this case shows that the PSC has implemented that intent and actively supervised such conduct. Indeed, the challenged conduct about which petitioners complain has been the repeated subject of PSC proceedings conducted pursuant to the state statutes.

On numerous occasions over a period of more than fifteen years, petitioner, Peter A. Bakal, both individually or as the president and sole director of one or more petitioner corporations, has filed complaints with the PSC and the FCC regarding the identical claim raised in this case. The claim has always been that the Telephone Company's interconnection rates and practices "discriminate" against petitioners in that the Telephone Company provides services to itself or to other "landline" telephone companies which it does not provide to local "radio" enterprises, like petitioners; or that it provides such services on less favorable terms.

The specifics of Bakal's claim of economic discrimination have over the years been consolidated by him into a written list of fifteen separate grievances which Bakal has on a regular basis filed with regulatory agencies on both the state and federal levels. This same list was filed in the United States District Court below and was produced by petitioners in response to the Telephone Company's discovery requests relating to the substance of petitioners' claims. Indeed, Bakal conceded in the District Court that all of the Telephone Company's allegedly discriminatory rates and practices known to him were set forth in his written list; that he had submitted that list to both the PSC and the FCC but that those agencies, in Bakal's words, had "refused to provide plaintiffs with adequate relief for the specific items before them,"[1] (Pet. Br. in the District Court in Opposition to the Telephone Company's Motion to Dismiss, at p. 4). In plain words, Bakal disagrees with the conclusions of the regulatory agencies involved regarding the appropriate interconnection policy to be followed in New York State and wants the federal courts to alter or change those agency determinations.

The thrust of the complaint in the District Court is that, as a result of state policy, petitioners are being forced to pay tariff rates and charges for public utility services that they allegedly would not have to pay if the decisions of the PSC on the issue of "interconnection" between common carriers — that is, the PSC's decision to treat ordinary telephone companies on a different basis than "radio" telephone companies—had in fact been decided the other way.

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1. Specifically, petitioners' list details fifteen categories of expense which, as a result of the PSC's interconnection decisions, petitioners' claim they, as a local radio carrier, must pay but landline companies are not required to pay (Pet. App. A., p. 3a).

B. Petitioners' Complaints To The New York Public Service Commission

Capital Telephone and Bakal have both been granted certificates of public convenience and necessity by the PSC. The record indicates that the administrative and judicial dispute over the issue of alleged economic "discrimination" in connection with the Telephone Company's interconnection rates and practices began in 1968 and has continued unabated since that time. The following is a partial list of formal proceedings in which petitioner Bakal's interconnection claims in this action were investigated and acted upon by the PSC.

In *Complaint of Capital Telephone, Inc.*, Case 25738, 13 NY PSC 462, 466, (1973), Bakal and Capital complained to the PSC that the Telephone Company was improperly according more favorable treatment to another telephone company, the Pattersonville Telephone Company ("Pattersonville Telephone"), because Pattersonville Telephone was a "landline" company and Capital was not. Petitioners asked that the Telephone Company be required by the PSC, in the exercise of its statutory powers under the New York Public Service Law, to negotiate (or, in the alternative, that the Commission prescribe) an agreement under which the Telephone Company would deal with Capital in the same manner it allegedly dealt with "landline" telephone companies.[2] However, the PSC, after full evidentiary hearings, rejected Capital Telephone's argument. It recognized there was a basic difference between "landline" and "radio" lines of business and held that local radio companies and landline telephone companies should not be treated as "sister utilities" stating:

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2. The complaint renewed arguments advanced before the PSC by Bakal in still earlier cases, where his arguments had been received unfavorably. *Capital Mobile Radio Service, Inc.*, Case 25051, *Peter A. Bakal*, Case 25052 (both decided August 20, 1969), 80 Pub. Util. Rep. 3d (PUR) 445, 449.

> "That utilities have in common a liability to regulation does not erase differences in their functions and mode of operation.
>
> The main function of landline companies is to provide conventional telephone service to the general public; interconnection among such companies primarily supports this basic function." *Id.* at 473.

The PSC furthermore rejected Capital's contention that the tariff and the agreement which the Telephone Company had with Capital Telephone were "discriminatory" or "anti-competitive". The PSC ruled that simply because Capital had a certificate of convenience and necessity granted to it by the PSC under the Public Service Law did not mean that it should be dealt with on the same terms as a "landline" company. The PSC ruled further that the Telephone Company was not economically "discriminating" against Capital by refusing to share it landline toll revenues with it. The PSC also directed Capital to continue to pay for connecting circuits and radio tielines at tariff rates and ruled that the Telephone Company had properly charged for facilities used to effect direct dial interconnection of Capital to the telephone network.

Subsequently, in *Petition of Tri-City Telephone Company,* Case 26378, 14 NYPSC 994 (1974), issued July 1, 1974, the PSC, after full evidentiary hearings, again rejected a charge by petitioners that their local radio enterprises should be treated as if they were "landline" telephone companies. Reviewing its earlier *Capital* decision, the PSC commented:

> "[Capital Telephone's] claim was grounded upon an alleged discrimination by NYT between interconnected landline carriers (which share in toll revenues) and radio common carriers. We rejected

> Capital's contention, concluding that Capital was not the subject of discrimination. We noted that a simple comparison between NYT's agreements with landline independents and radio common carriers was not possible due to the differences in the activities of the utilities and the varying degrees of complexity associated with the contract arrangements between NYT and independents."

Petitioners' subsequent judicial review proceeding challenging this determination was denied by the New York courts. See, *Tri-City Telephone Co. v. Kahan*, 49 App. Div. 2d 126 (3rd Dept. 1975).

On May 26, 1978, petitioners again complained to the PSC about the Telephone Company's alleged "illegal, preferential and anti-competitive conduct" in purportedly favoring Pattersonville Telephone over Capital. Petitioners requested the PSC to "issue an immediate order mandating that plaintiffs and Pattersonville Telephone be treated equally by New York Telephone Company in the provision of interconnection facilities." The PSC Staff, after investigating petitioners' charges, found them to be "without merit" and recommended that petitioners' request for relief be denied. The Staff's memorandum reads in relevant part:

> "Bakal's complaints are predicated on the assumption that it is proper to compare the Bakal-NYT interconnection with the Pattersonville-NYT interconnection. We do not agree that this is the proper comparison. Pattersonville provides landline telephone service in a particular geographic area, using central office switching facilities to do so. Pattersonville also provides radio services, using a terminal interconnected with its central office equipment. We believe this is the operation that can properly be compared to Bakal . . .

> Fundamentally, Bakal is a radio telephone utility, not a wireline telephone company. Bakal is entitled to the same treatment as any other radio telephone utility, as well as the same treatment afforded the radio operations of the wireline carriers. We find that Bakal is being treated in a non-discriminatory fashion" (Emphasis in the original).

Based on this memorandum, the PSC wrote to petitioners that it was denying petitioners' request for an order mandating that Bakal, Capital and Pattersonville Telephone Company be treated as "sister utilities" in the provision of interconnection facilities.

In June and July of 1983, petitioners again complained to the PSC concerning alleged "unequal treatment" by the Telephone Company in terms of the latter's interconnection rates and practices vis-a-vis Pattersonville Telephone. By order of the PSC in Case 28677, the issue of "whether Capital Telephone is interconnected to New York Telephone's facilities under substantially the same circumstances as Pattersonville" was set down for a formal evidentiary hearing. That hearing is ongoing before the PSC at the present time.[3]

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3. Petitioners also raised the identical charges of "discrimination" in connection with the Telephone Company's alleged "anti-competitive" interconnection rates and practices before the FCC, setting forth fifteen separate services (the list of grievances) regarding which petitioners claimed to have suffered economic "discrimination" at the hands of both the Telephone Company and Pattersonville Telephone, including the issue of division of landline revenues and settlement agreements. The Court of Appeals summarizes the FCC's involvement with Bakal in its opinion (Pet. Appendix, pp. 4a-5a).

C. Statutory Framework of Telecommunications Regulation

State Regulation

The Telephone Company is a "telephone corporation" as defined by the New York Public Service Law § 2(17).[4] The scheme of regulation set forth in the Public Service Law displaces the unfettered business freedom that telephone corporations otherwise would have and subjects telephone corporations to close regulatory supervision.[5] Article Five of the statute contains the enactments relating to telephone rates and practices. The PSC is empowered to establish rates and charges for the interconnection of the lines of local carriers, "and to declare the portion thereof to which each of the corporations affected thereby shall be entitled, and

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4. "The term 'telephone corporation,' when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating or managing any telephone line or part of a telephone line used in the conduct of the business of affording telephonic communication for hire. . . ."

5. Section 94(2) provides in part:

> "The commission shall have general supervision of all . . . telephone corporations and . . . telephone lines within its jurisdiction as hereinbefore defined and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property are leased, operated or managed, conducted and operated with respect to the adequacy of and accommodation afforded by their service and also with respect to the safety and security of their lines and property, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements . . ."

the manner in which the same shall be secured and paid." Section 97(3). Each telephone corporation must in turn file with the PSC a complete schedule of all rates, rentals and charges for service. It must also file with the PSC a copy of any contract, agreement or arrangement in writing with any corporation, association or person relating in any way to the construction, use or maintenance of its lines or service. Section 92(1). No change in rates, charges or "in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility" may take place without notice to or approval by the PSC. Section 92(2). The PSC is empowered to investigate on its own motion or upon the complaint of any person any act done or omitted by a telephone corporation in violation of any provisions of law or any order of the PSC. Section 96. If the PSC, after a hearing, is of the opinion that rates, charges, or "the rules. regulations or practices of any telephone corporation affecting such rates, charges. rentals or service are unjust, unreasonable[6] or unjustly discriminatory or unduly preferential[7] or in anywise in violation of law" or that the maximum rates or charges are "insufficient," the PSC can set new maximum rates or "determine the just, reasonable, adequate, efficient and proper regulations, practices, equipment and service thereafter to be installed, to be observed and used, and prescribe the same by order." Section 97(1) and (2). Sections 102 and 103 provide

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6. Every telephone corporation is required to furnish "such instrumentalities and facilities as shall be adequate and in all respects just and reasonable . . ." Section 91(1).

7. Section 91(3) provides that:

> "No . . . telephone corporation shall make, or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

enforcement proceedings and penalties for violation of any provision of Article Five or any order, direction or requirement of the PSC.

D. District Court Determination

The Telephone Company moved in the District Court below to dismiss the complaint on the ground that the Telephone Company's interconnection rates and practices with respect to local radio carriers were immunized from the operation of the federal antitrust laws under the "state action" immunity doctrine.

In granting the Telephone Company's motion, the District Court held that "state action" immunity existed under the *Parker-Midcal* line of cases. After examining the New York State Public Service Law, the New York courts' interpretation of that statutory scheme and the State's legislative activity in the telecommunications industry, the Court concluded that close and active regulation and supervision of the Telephone's Company's rates and business practices by both state law and the PSC had clearly satisfied the two-pronged test articulated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) for the application of a "state action" immunity defense.

E. The Decision and Judgment of the Court of Appeals - Second Circuit

The Court of Appeals affirmed, holding that New York State's current policy clearly requires the imposition of regulatory controls over unfettered competition in the telephone industry and that the New York Legislature had given the PSC an active role in the implementation of that policy. Accordingly, the Court said, in the absence of evidence of an intent by Congress to preempt the field of telecommunications, or the existence of an irreconcilable conflict between state and federal law, a holding

that a state's own regulatory scheme may not supersede the operation of the federal antitrust laws "would challenge the federalism on which our governmental system is based".

ARGUMENT

I.

THE SECOND CIRCUIT WAS CORRECT IN HOLDING THAT PETITIONERS' ANTITRUST CLAIMS ARE BARRED BY THE STATE ACTION IMMUNITY DOCTRINE.

A. State Policy

Bakal argues that a "clearly articulated and affirmatively expressed" state policy requires a specific language statement in the New York Public Service Law announcing New York State's intent to displace competition with regulation in the telecommunications industry (Petition, pp. 9-11). However, this Court held in the *Southern Motor Carriers Rate* case, *supra,* that a private party, like the Telephone Company, "acting pursuant to an anti-competitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct." According to this Court's opinion, "as long as the state as sovereign intends to displace competition in a particular field with a regulatory structure," the first prong of the *Midcal* test is clearly satisfied. *Id.* As this Court said:

> "If more detail than a clear intent to displace competition were required of the legislature, states would find it difficult to implement through regulatory agencies their anti-competitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express

> authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness."

Accordingly, a state policy exists when it is found "from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of." *Lafayette,* 435 U.S. at 415 (plurality opinion); *Town of Hallie v. City of Eau Claire,* ____ U.S. ____, No. 82-1832, issued March 27, 1985 ("It is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects . . ."); *Princeton Community Phone Book, Inc. v. Bates,* 582 F.2d 706, 717 (3rd Cir.) *cert. den.,* 439 U.S. 966 (1978)("the state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made"); *Hybud Equipment Corp. v. Akron, Ohio,* 742 F.2d 949, 960 (6th Cir. 1984)("a legislative intent to displace competition may be inferred from the legislature's delegation of authority"); Morgan, *Antitrust and State Regulation: Standards of Immunity After Midcal,* 35 Ark. L. Rev. 453, 464-65 (1981)("[A]uthority to regulate may be implied in general delegations of authority. Any restraints based on such implied legislative decisions must, however, be basic to the regulatory program's functioning").

Put differently, the courts are required, as the Second Circuit expressed it below, to ascertain whether the challenged action is "reasonably related" to an agency's express powers and "reasonably designed" to promote state aims within a designated field of regulation (Pet. App. A, p. 891); *accord, Preferred Communications, Inc.,* 1985-1 Trade Reg. Reports, ¶ 66,452 (9th Cir., March 1, 1985); *Catalina Cablevision Assoc. v. City of Tucson,* 745 F.2d 1266, 1269 (9th Cir. 1984).[8]

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8. Petitioners' reliance on *Capital Telephone Company, Inc. v. Pattersonville Telephone Co., Inc.,* 56 N.Y.2d 11 (1982) for the proposition

(Cont'd)

The challenged conduct in this case clearly meets that standard as demonstrated by respondent's Counterstatement of the Case above.

B. Active State Supervision

It is clear from the record that Bakal has presented only a single complaint to the District Court below, *i.e.*, the alleged discriminatory nature of New York State's interconnection policy—a policy which defines the terms and conditions under which an ordinary so-called "landline" telephone company, like New York Telephone, is required to connect its lines with local "radio" telephone companies. As previously explained, the thrust of petitioners' claim is that they are being forced to pay charges set forth in PSC tariffs, *i.e.*, the fifteen items of expense detailed in petitioners' list of grievances, which expense they contend they would not have had to endure if the PSC's policy on interconnection had developed in line with petitioners' views on the matter. However, the issue of what is an appropriate interconnection policy has been several times litigated before the

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(Cont'd)

that it is not the policy of New York State to grant immunity from its own state antitrust laws (and therefore, by extension, from the federal antitrust laws) is, as the Second Circuit held below, entirely inapposite (Petitioners' Appendix A, p. 25a). Since only a state statute was there involved, neither the issue of the applicability of the doctrine of federal preemption through the operation of the Supremacy Clause nor, for that matter, this Court's interpretation of that doctrine in the *Southern Motor Carriers* case, *supra*, was before the court in that case. The question decided there was simply whether a previous PSC complaint by plaintiff Capital Telephone against the New York Telephone Company had collaterally estopped the former from suing another telephone company, Pattersonville Telephone Company, under New York State's Donnelly Act.

PSC as have the specifics of petitioners' list of grievances.[9] As often as petitioners have urged that local radio telephone companies and ordinary telephone companies should be treated as "sister utilities," the PSC has, after evidentiary hearings, rejected such an alternative course of conduct as a matter of state policy.

Moreover, as is evident from a reading of the relevant provisions of the New York Public Service Law, that statute was enacted, *inter alia,* both to formulate state policy regarding the interconnection of common carriers and to identify and deal with allegations of the very type made by petitioners in their list of grievances — allegations of "unjust," "unreasonable" and "discriminatory" rates and business practices. The PSC has in this case explicitly implemented that statutory mandate by specifically addressing each and every recommendation and alternative put forward by petitioners over the years. No firmer satisfaction of the "active supervision" prong of the *Midcal* analysis could reasonably be asked or required. Petitioners' contentions to the contrary (Petition, pp. 11-12) are clearly wrong.

C. Compulsion

In the *Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* this Court resolved an apparent conflict between the Fifth and Second Circuits as to whether the actions of a private party must be "compelled" by the state in order to

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9. Contrary to the statement made at p. 12 of the Petition, the PSC has considered all of the items contained in Bakal's list of grievances including Bakal's request for a division of revenues or EAS settlement and has rejected them. Bakal's demand for a division of revenues and the PSC's disposition of it was also the subject of a judicial review proceeding brought by petitioners' in New York State Supreme Court. See footnote 2 to the Second Circuit's opinion in this case (Pet. App. A, pp. 4a-5a).

be protected from the federal antitrust laws. This Court held that, contrary to the position espoused by petitioners in this case, the federal antitrust laws do not forbid a state to adopt policies that permit, but do not compel anti-competitive conduct by regulated private parties. *Id.* As this Court noted the first prong of the *Midcal* test is satisfied, even in the absence of a statute expressly permitting the challenged conduct, where the legislature has made clear that the details of an allegedly anti-competitive scheme are to be left to the discretion of a designated regulatory agency, rather than to the marketplace. *Id.*[10]

The Court summed up its position on the "compulsion" requirement as follows:

> The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages states to require, rather than merely permit, anti-competitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary." (Emphasis in original.)

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10. Section 97(3) of the New York Public Service Law not only authorizes the PSC to establish rates and charges for interconnection purposes but also "to declare the portion thereof to which each of the corporations affected thereby shall be entitled and the manner in which the same shall be secured and paid."

D. State Regulation and Federalism

The petitioners contend that immunizing the practices at issue here from the scope of the antitrust laws "conflicts with the official regulatory policy of the State of New York" and "conflicts with the federalism doctrine" (Petition, p. 20). They are wrong.[11]

Clearly, the New York Legislature has deregulated portions of the communications industry in New York where those particular portions of the industry have become highly competitive. However, contrary to the suggestion of petitioner, the telephone services at issue in this case have not been deregulated. Thus, regulation remains the official policy of the state with respect to those services. The address of the Chairman of the New York Public Service Commission to members of the New York Legislature (Petition, Appendix D) is very instructive on this point. In his address he called for deregulation where appropriate and he established a division between (a) "landline" telephone companies such as New York Telephone that provide basic exchange telephone service and (b) companies such as petitioners' that do not provide such service (Petition, pp. 58a-59a). He then stated (Petition, p. 59a):

> The first group — the providers of basic exchange telephone service — will continue to support basic

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11. Petitioners also make the statement that the terms under which basic exchange facilities are connected to the facilities of the petitioners are not subject to regulation by the New York Public Service Commission (Petition, p. 20). In a rate proceeding before the PSC petitioners' counsel took the position that the compensation to the regulated operations of the Telephone Company for services and facilities used by unregulated operations were subject to the scrutiny of the PSC. This position was upheld by the Administrative Law Judges in that proceeding (NYPSC Case 28961, Ruling on Motion to Compel Interrogatory Responses, issued March 12, 1985). Moreover, as noted earlier, the petitioners have invoked the jurisdiction of the New York PSC in a proceeding now pending with respect to their complaints as to interconnection. The Telephone Company recognizes, and so do the petitioners, the jurisdiction of the New York PSC in this matter.

> exchange service on a monopoly basis within their franchise territories for the foreseeable future.
>
> * * *
>
> The second group of companies may not require state regulation at all. For example, radio-telephone utilities serve what is now a highly competitive market.

Following Chairman Gioia's address, the New York State Legislature did, in fact, amend the Public Service Law so as to deregulate radio-telephone companies. And, consistent with the point made in Chairman Gioia's address, the Legislature retained under regulation the provision by landline telephone companies of basic exchange service.[12] Thus, the terms under which New York Telephone permits petitioners to connect to the basic landline exchange network — the matter at issue — is very much still a part of the state's regulatory scheme.[13]

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12. At several places in their petition, petitioners refer to Chapter 564 of the New York State Laws of 1984 (Petition, p. 6 fn., p. 10 fn., p. 6 fn.) and they state that Chapter 564 "deregulated the specific radio-telephone services at issue in this case." (Petition, p. 10 fn.). These references are irrelevant and petitioners' statement is flatly wrong because, as indicated above, the Telephone Company rates and services at issue here were not deregulated.

13. Petitioners have also misleadingly referred to PSC statements that the PSC is not the enforcer of the antitrust laws (Petition, p. 18). Petitioners would leave the impression that they have no forum for their complaint if not the antitrust court. That is wrong. The PSC does consider the conduct in question — but pursuant to the standards of the New York regulatory statute and not simply the antitrust standards. Indeed, even the correspondence cited by petitioners demonstrates that the PSC does provide a forum for the complaints of petitioners (Pet. Appendix F).

Indeed, New York State's deregulation of radio-telephone companies is a further indication of the care the New York Legislature has taken with respect to the delineation of the deregulated versus the regulated segments of businesses in New York. Its prior singling out of telegraph companies for deregulation was an action that, in the words of the Second Circuit, "leads inescapably to the conclusion that it viewed continued regulation of the telephone industry as necessary to displace competition in the public interest" (Pet. Appendix A, p. 17a). Similarly, the Legislature's deregulation of radio companies is further confirmation that it intends to continue the regulation of landline telephone companies.

Petitioners' further contention that immunization causes a conflict with the principles of federalism is certainly far-fetched. The principles of federalism were the basic underpinnings of the *Parker-Midcal-Southern Motor Carriers* doctrine. The principles of federalism clearly support the decision of the Court of Appeals below.[14]

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14. Petitioners' reference to Judge Greene's decision is clearly misplaced. Whether or not Judge Greene's analysis was correct, he certainly was dealing with a far different situation. He was dealing with a nation-wide Bell System. The outcome of Judge Greene's decision was the break-up of that system. New York Telephone is now restricted, in essence, to local intrastate telephone service. At issue in this case is the connection of local radio companies to New York Telephone's local basic exchange network. Clearly, the New York Public Service Commission has the right to regulate that connection.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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